

*“As long as I do not firmly and irrevocably possess the right to vote I do not possess myself. I cannot make up my mind — it is made up for me. I cannot live as a democratic citizen, observing the laws I have helped to enact — I can only submit to the edict of others.”*<sup>1</sup> Martin Luther King Jr.

## Introduction

The 2012 presidential elections are approaching, but over five million Americans in 48 states and the District of Columbia will be denied the right to vote. Why? Because they are current or past felons who cannot exercise a right guaranteed to them in the Constitution of the United States<sup>2</sup>, a right in which the Supreme Court has declared fundamental<sup>3</sup>, and statutes such as the Voting Rights Act of 1965 has protected<sup>4</sup>. Approximately two million of those disenfranchised have served their prison sentence and have been released from prison, but are still denied the right to vote. This injustice has attracted international attention. In 2006 at the United Nations Human Rights Committee meeting in Geneva, the committee declared that the United States disenfranchisement laws violate international law and are discriminatory; disproportionately affecting African Americans.<sup>5</sup> According to the Sentencing Project, one in every eight African Americans males are barred from voting.<sup>6</sup> In addition, the felon disenfranchisement affects the poor. According to researchers Jeff Manza and Christopher

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<sup>1</sup> <http://www.pbs.org/pov/pov2008/election/wvote/king.html> (last visited March 12, 2011)

<sup>2</sup> 15th amendment; 24TH AMENDMENT The Twenty-Fourth Amendment to the Constitution of the United States, ratified Jan. 23, 1964, bans the use of poll taxes (or any other tax) in federal elections. Such taxes were imposed by five states--Alabama, Arkansas, Mississippi, Texas, and Virginia, as a means to circumvent the Fifteenth Amendment guarantee of equal voting rights

<sup>3</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 357 (1886)

<sup>4</sup> Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973

<sup>5</sup> (<http://www.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR.C.USA.CO.pdf> (last visited March 12, 2011))

<sup>6</sup> [http://www.sentencingproject.org/doc/publications/publications/vr\\_ExpandingtheVoteFinalAddendum.pdf](http://www.sentencingproject.org/doc/publications/publications/vr_ExpandingtheVoteFinalAddendum.pdf)

Uggen the median incomes of inmates at the time of incarceration was a mere \$14,430 in 1997.<sup>7</sup>

While disenfranchisement makes persons poor in terms of economic deprivation, it also makes a person poor by limiting a person's capability to freely function normally in society.

In this paper I will take an in-depth look at the impact of felony disenfranchisement on the poor and more specifically on the African American community. The paper will focus on the current felony disenfranchisement law, the history of felony disenfranchisement, the disparate impact of felony disenfranchisement, the expansion of felon disenfranchisement and the right course of action to restore the voting rights to those individuals who are presently disenfranchised.

## **The History of Disenfranchisement Laws**

It may seem too many that disenfranchisement laws are as American as apple pie and have their origins since the building of the republic. However, this assumption is misguided and incorrect. By 1850 only 11 states had disenfranchisement laws; a century later 38 states had such laws.<sup>8</sup> By 2000, 48 states had some type of law restricting the voting rights of convicted felons.<sup>9</sup>

The majority of disenfranchisement laws were enacted at critical points in American history, in which legislation was passed and court decisions rendered that cemented the right for several classes of people to vote. The passage of disenfranchisement laws occurred in waves.

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<sup>7</sup> Manza, Jeff and Uggen Christopher, *Locked Out*, Oxford University Press, New York, (2006)

<sup>8</sup> Manza, Jeff and Uggen Christopher, *Locked Out*, page 50

<sup>9</sup> *Id*

The first wave occurred in the 1840's in the Northeast, which was after the repeal of laws that restricted the voting to property-owning white males.<sup>10</sup> The second wave occurred in South in the 1860's after the Civil War and the passage of the 15<sup>th</sup> amendment and the extension of voting rights to African American men.<sup>11</sup> Therefore, one can surmise that as voting rights were extended to classes of people, disenfranchisement laws were enacted to curtail the right to vote of African American men and impoverished white males.

### **Disparate Impact of Felony Disenfranchisement**

In the 2000 election approximately 4.7 million Americans were prevented from voting due to criminal disenfranchisement. This number is estimated to have increased to five million in the 2004 presidential elections. Although, felony disenfranchisement affects society as a whole, it disproportionately affects African Americans and impoverished citizens. While African Americans constitute 12 percent of the United States population, they comprise 36% of the population that has lost the right to vote due to criminal conviction.

One factor that causes a disparate impact is the “War on Drugs.”<sup>12</sup> The “War on Drugs” was announced by Richard Nixon in 1971. Nixon announced at a press conference that “America’s enemy number 1 is drug abuse.”<sup>13</sup> After the announcement Congress enacted new

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<sup>10</sup> Manza, Jeff & Uggen, Christopher, *Locked Out*, Oxford University Press, (2006)

<sup>11</sup> *Id* at 51

<sup>12</sup> Hull, Elizabeth A., *The Disenfranchisement of Ex-Felons*, Temple University Press (2006)

<sup>13</sup> *The Nation: The New Public Enemy No. 1*, Time, June 28, 1971, at 20, available at <http://www.time.com/time/magazine/article/0,9171,905238-1,00.html>. (last visited March 12, 2011)

legislation which replaced over fifty pieces of drug legislation with the Controlled Substances Act.<sup>14</sup> The Controlled Substances Act gave Congress the authority to regulate interstate commerce for drugs and established five schedules which classified controlled substances according to their potential for abuse.<sup>15</sup> Drugs were categorized according to potential danger, potential abuse and determination of any legitimate medical value.<sup>16</sup> President Nixon laid the foundation for the war on drugs and other presidents expanded the war to include model anti-paraphernalia law for state legislatures<sup>17</sup>, implementing the “just say no” campaign,<sup>18</sup> and implementing proposals through state law enforcement.<sup>19</sup>

The War on Drugs has a huge effect on the communities due to the increased incarceration of people who were convicted of possession of illegal substances. Prior to the 1970s incarceration rates in the United States remained more or less constant at roughly 110 prisoners for every 100,000 people.<sup>20</sup> As President Clinton left office in 2000 the number of state

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<sup>14</sup> Supplemental Financial and Management Information: DEA History, <http://www.justice.gov/oig/reports/DEA/a9731a/a9731ap5.htm> (last visited April 2, 2011).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Potshots at “Head Shops,” *Time*, Apr. 21, 1980, at 78, available at <http://www.time.com/time/magazine/article/0,9171,924029,00.html>. President Carter’s administration implementation of model para-phanelia law was a complete departure from his campaign and original drug policy actions. ( last visited March 12, 2011)

<sup>18</sup> Ronald Reagan and The 1980s: Perceptions, Policies, Legacies 49 (Cheryl Hudson & Gareth Davies eds., Palgrave McMillan 2008). First Lady Nancy Regan coined the term.

<sup>19</sup> Dan Check, The Successes and Failures of George Bush's War on Drugs, <http://www.drugsense.org/tfy/bushwar.htm> (last visited April 2, 2011).

<sup>20</sup> “U.S. Prison Population at New High,” AP News, April 2000, [http://wire.ap.org/APnews/center\\_story.html?FRONTID=NATIONAL&STORYID=APIS7AV](http://wire.ap.org/APnews/center_story.html?FRONTID=NATIONAL&STORYID=APIS7AV) (last visited March 10, 2011)

and federal prisoners had risen more than 600 percent.<sup>21</sup> The incarceration rates are steadily increasing; at the end of 2003 there were approximately 6.9 million people under the control of the American criminal justice system, or roughly 3.2 percent of the adult population.<sup>22</sup>

The “War on Drugs” has had a profound impact on African Americans. According to researcher Elizabeth Hull Black males in at least fifteen states were imprisoned on drug charges at rates anywhere from twenty percent to fifty-seven percent times those of white men.<sup>23</sup> Due to such disparities politicians and celebrities wrote UN Secretary Kofi Annan describing the “war on drugs” as a “de facto form of racism.”<sup>24</sup>

## **The Political Impact of Felon Disenfranchisement in the United States**

### **Felony Disenfranchisement Affects the Outcomes of the Political Process**

Felony disenfranchisement has had significant impact on the American political system by shutting people out of the political process. Felony disenfranchisement has eroded the democratic base by locking out key constituents of the political parties. African Americans account for significant portion of the Democratic party and in the 2008 presidential election voted in overwhelming numbers for the Democratic candidate.<sup>25</sup> Moreover, the white felon

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<sup>21</sup> Hull, Elizabeth, *The Disenfranchisement of Ex-Felons*, Temple University Press, Philadelphia (2006) page 25

<sup>22</sup> Fox Butterfield, “U.S. Correctional Population’ Hits New High,” *New York Times*, July 26, 2004

<sup>23</sup> Hull, Elizabeth, *The Disenfranchisement of Ex-Felons*, page 25

<sup>24</sup> *Id.*

<sup>25</sup> <http://www-958.ibm.com/software/data/cognos/manyeyes/datasets/voting-statistics-election-2008/versions/1>  
(last visited March 10, 2011)

population principally composed of poor or working-class offenders are likely to identify as Democrats, although not nearly as much as African Americans<sup>26</sup> and according to a nationally representative survey of state prison inmates, less than one-third of the all-state prisoners had completed high school and fewer than half reported an annual income of \$10,000 in the year prior to incarceration.<sup>27</sup> For such reasons it is permissible to surmise that felon disenfranchisement affects the outcomes of democratic elections by taking net votes from the Democratic Party.<sup>28</sup>

The evidence is even more startling in research that included disenfranchised population votes into the outcomes of several presidential elections; the outcomes were significant.<sup>29</sup> By matching the felon population with the rest of the voting population and accounting for the political behavior which effect voter turnout, such as race, religion, and income; researchers predicted that 35 percent of disenfranchised felons would have voted in the presidential election

<sup>26</sup> Uggen, Christopher, Manza, Jeff, Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States, *American Sociological Review*, Vol 76, No. 6, (Dec. 2002) page 780

<sup>27</sup> Uggen, Christopher, Manza, Jeff, Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States, *American Sociological Review*, page 781

<sup>28</sup> *Id* 781

<sup>29</sup> *Id* at 783. Researchers derived data from the Voter Supplement File of the Current Population Survey. The estimates of the expected vote choice of disenfranchised felons are developed using the National Election Student data for 1972 to 2000. We analyze age and education (in years) as continuous variables. Income is a continuous variable measured in constant 1999 dollars. Labor force status, marital status, gender, and race are dichotomies (an African American-non-African American dichotomy necessitated by the lack of information about Hispanic voters in the NES series prior to the 1980s). We use similar measures for both the turnout analyses (using CPS data) and vote choice analyses (using NES data).<sup>8</sup> Once we have estimated political participation and party preference equations on the general population, we insert the mean characteristics of disenfranchised felons into these equations to obtain their predicted rates of turnout and Democratic Party preference. We obtain information on the socio-demographic characteristics of convicted felons from the Survey of State Prison Inmates data series (USDOJ 1993, 2000b). The dependent variables in both the turnout and vote-choice analyses are dichotomous, so we estimate logistic regression models of the probabilities of participation and Democratic vote choice, respectively. In the turnout equations, the outcome is coded for voted, and 0 for did not vote. In the voting equations, the outcome is coded 1 for Democratic and 0 for Republican choice. We consider only major party voters, as in Senate elections few third-party or independent candidates have come close to winning office. <sup>9</sup> Coefficients from these regressions are reported in Appendix Table C.

and that about 24 percent would have voted in the senate elections during nonpresidential election years.<sup>30</sup> These voting rates have the ability to change the result of senatorial and presidential elections and presumably change the policy and course of the country. Researchers find that since 1978, 7 out of the 400 senatorial elections may have been reversed if not for the disenfranchisement of felons and ex-felons.<sup>31</sup> The number of elections could have potentially been reversed may seem small and insignificant, but in actuality may have shifted the power in the senate. This is true especially in the 1984 elections, “under the cumulated counterfactual scenario in which disenfranchised felons are calculated to have voted, the Democrats may have achieved parity with the Republicans.”<sup>32</sup> Research further suggests that the Democratic candidates were likely to have prevailed in the 1988 Florida senatorial election, the 1999 Georgia senatorial election and in 1998 in Kentucky’s senatorial election if the felons had been allowed to vote, thus possibly allowing the Democratic Party to have control of the Senate in the 1990’s.<sup>33</sup>

According to data there is also evidence that disenfranchised voters should have altered the 2000 presidential election<sup>34</sup>. If disenfranchised felons have been permitted to vote, it is estimated that Gore’s margin of victory in the popular vote would have surpassed a million votes.<sup>35</sup> Regardless of the popular vote, the election was decided by one state, Florida. If the

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<sup>30</sup> Id 786

<sup>31</sup> Id 789

<sup>32</sup> Id. 789

<sup>33</sup> Id. 790

<sup>34</sup> Id

<sup>35</sup> Id

disenfranchised in Florida were allowed to vote, Democrat Gore would have carried the state.<sup>36</sup>

In Florida there are approximately 827,000 disenfranchised felons, if these people voted in the election at the estimated rate of 27.2 percent and 68.9 percent for the democratic candidate, Gore would have carried the state by more than 80,000 votes.<sup>37</sup>

## **Policy Implications of Felony Disenfranchisement**

A core concept of democracy is the idea of “representative government.” Representative government is based on the idea that,

The people elect their representatives directly, and for the most part annually, in order to secure their dependence. The people are the real directing power; and although the form of government is representative, it is evident that the opinions, the prejudices, the interests, and even the passions of the people are hindered by no permanent obstacles from exercising a perpetual influence on the daily conduct of affairs.<sup>38</sup>

Felony disenfranchisement disallows citizens the right to vote and influence elected officials.

Therefore, their “prejudices, interests and passions” are hindered and thus, their economic, social and political interests are not observed by elected officials. This is especially true when voting for legislation that will reduce poverty.

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<sup>36</sup> Id

<sup>37</sup> Id. 792

<sup>38</sup> De Tocqueville, Alexis, Democracy in America, [www.archive.org](http://www.archive.org), (1835)



The American Scorecard publishes an annual report card which rates every member of Congress on how they voted on anti-poverty legislation. The legislation voted on by members of congress included; Hiring Incentives to Restore Employment, Amendment Extending for TANF Program, Unemployment Compensation Extension Act of 2010, The Education Jobs and Medicaid Assistance Act, Paycheck Fairness Act, Disaster Relief Summer Jobs Act, and Rural Housing Preservation and Stabilization Act of 2010, etc.<sup>39</sup> Out of the six states that permanently disenfranchise in half both representatives received an “F” and a fourth of the states at least one of the elected officials earned an “F” or “D”.<sup>40</sup> Thus felony disenfranchisement has not only an effect on who is elected, but also the legislation.

### **Virginia: Case Study**

One of the six states that permanently disenfranchise its citizens is Virginia. The Virginia State Constitution asserts, “No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority. As prescribed by law, no person adjudicated to be mentally incompetent shall be qualified to vote

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<sup>39</sup> <http://www.povertyscorecard.org/bills/>

<sup>40</sup> <http://www.povertyscorecard.org/everything/> Methodology: In consultation with approximately 20 national anti-poverty experts on a wide range of topics, we selected the most significant votes on poverty issues in the U.S. Senate and House in calendar year 2010. The votes we selected cover a wide range of subject areas, including health care reform, unemployment insurance, jobs, housing, consumer protection, child nutrition, rural poverty and immigrants. Each member of the House is scored based on 16 selected votes and each member of the Senate is scored based on 14 selected votes. If a member did not cast a “yes” or “no” vote on a particular measure (for example, if the member was absent), that vote was not considered in determining the member’s score. Each vote is given equal weight. We did not score members who did not vote enough times for the score to be a fair assessment of their performance. We ranked 429 of 435 members of the House of Representatives, each of whom voted on at least 10 of the 16 votes we selected. We ranked 99 of 100 senators, each of whom voted on at least 11 of the 14 votes we selected. Unless otherwise indicated, we used the vote on final passage. Where multiple votes were cast on a bill, we selected the vote that was the most significant in fighting poverty, either the clean vote, meaning the vote before extraneous provisions were added or after they were stripped away; the decisive vote, meaning the vote that decided whether the bill or amendment would move forward in 2010; or the compromise vote, meaning the vote on the version that had the best chance of becoming law. While we were deciding which votes to use, we did not review the roll call on any vote, nor did we review any other material that would have indicated how a particular member voted.

until his competency has been reestablished.”<sup>41</sup> In 2003 felony disenfranchisement deprived approximately 377, 847 citizens or 6.67 percent of the voting population the right to vote.<sup>42</sup>

The newly elected governor is looking to restore voting rights at a pace that far exceeds predecessors and within a process that is efficient and fast. Historically, Virginia has been sparing in re-enfranchising its citizens convicted of felonies. Only 238 applicants had their rights restored 1998 to 2002.<sup>43</sup> Governor McDonnell is also out pacing previous Democratic Virginia governors. Previous Democratic governor Mark Warner restored the rights of 3,486 felons while in office.<sup>44</sup> Former Governor Timothy Kaine restored the rights of 4,402 felons while in office.<sup>45</sup> The restoration of Democratic governors is a drop in the bucket compared to the number of Virginia citizens that are unable to vote. However, Robert F. McDonnell took office in 2010 and has restored 780/889 or 88 percent of citizens’ rights to vote.

McDonnell has received praise for restoring the rights of so many citizens so fast. This in part is due to key changes in the process of restoration. The restoration of rights process creates a 60-day deadline from the Governor’s office on restoration of rights application, once all required information is received from the applicant, courts and other agencies.<sup>46</sup> The previous standard was 6 months to a year. The restoration process reduces the time from 3 to 2 years that

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<sup>41</sup> VA CONST Art. 2, § 1

<sup>42</sup> <http://vaopengov.org/FelonRights/FelonEnfranchisementVA.html>

<sup>43</sup> Manza, Jeff and Uggen Christopher, Locked Out, page 85

<sup>44</sup> [http://funderscommittee.org/resource/mcdonnell\\_outpacing\\_democrats\\_in\\_restoring\\_va\\_felons\\_voting\\_rights](http://funderscommittee.org/resource/mcdonnell_outpacing_democrats_in_restoring_va_felons_voting_rights)  
(Last visited March 22, 2011)

<sup>45</sup> [http://funderscommittee.org/resource/mcdonnell\\_outpacing\\_democrats\\_in\\_restoring\\_va\\_felons\\_voting\\_rights](http://funderscommittee.org/resource/mcdonnell_outpacing_democrats_in_restoring_va_felons_voting_rights)  
(Last visited March 22, 2011)

<sup>46</sup> [www.governor.virginia.gov/news/viewRelease.cfm?id=183printpage=Yes](http://www.governor.virginia.gov/news/viewRelease.cfm?id=183printpage=Yes) (Last visited March 22, 2011)

non-violent felons must wait for restoration of rights,<sup>47</sup> reduces the time from 2 years to 1 year that an applicant must wait to reapply if he/she is denied the restoration of rights,<sup>48</sup> and allows applicants to list a brief description of civil and community involvement.<sup>49</sup> McDonnell is also attempting to include affected groups into the process in order to develop solutions to increase efficient results.<sup>50</sup> In addition, McDonnell has proven that he is willingly to listen to community leaders and activist when he cut the previous implemented that applicants must submit an essay along with their application to be eligible for voter restoration.

McDonnell's restoration process has two tracks. People who were convicted of Embezzlement, Welfare Fraud , Habitual Offender , Grand Larceny , Drug Possession (must not be Drug Possession with the Intent to Distribute) , Breaking and Entering , Burglary/Statutory Burglary/Possession of Burglarious Tools must complete a two-year application<sup>51</sup>. Applicants that committed Drug Possession with the Intent to Distribute , Drug Distribution, Drug Manufacturing, Robbery, Malicious/Unlawful Wounding, Felonious Assault, Maiming, Murder, Manslaughter – Involuntary or Voluntary, Production, publication, sale, financing, etc., of child pornography, Shooting into an Occupied Vehicle or Building, Arson of an Occupied Vehicle or Building, Hit & Run/Leaving the Scene of an Accident with Injury and Election Fraud<sup>52</sup> must

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<sup>47</sup> Id.

<sup>48</sup> Id.

<sup>49</sup> Id.

<sup>50</sup> Id. The governor establishes an internal working group representatives from the SOTC's office, the Legislative Black Caucus, a rural and urban representative from the Clerks of Court Association, the DMV, the Attorney General's Office, the State Police, the Department of Corrections, civil rights groups, and other affected parties to develop solutions for increasing document gathering efficiencies in the process. A report will be required by Aug. 1

<sup>51</sup> <http://www.commonwealth.virginia.gov/judicialsystem/clemency/restoration.cfm>

<sup>52</sup> <http://www.commonwealth.virginia.gov/judicialsystem/clemency/restoration.cfm>

complete a five-year application. Allowing a 2 year application for offenders that commit seemingly minor felonies opens the door to increased felons participation in the political system. This is especially true for African Americans who are 25 times more likely to end up behind bars for drug-related crimes.

Although Governor McDonnell has received praise for restoring voters' rights, people believe there is more work to be done. Kent Willis the Executive Director of the ACLU's Virginia Chapter, praised McDonnell, and added: "There are more than 300,000 people who still don't have their rights restored. The governor's reforms are good, but they don't tackle the problem. It simply doesn't address the real issue."<sup>53</sup>

Although Governor McDonnell is making strides in Virginia, there are still millions of American citizens who still lack their voting rights. States like Florida have disenfranchised approximately 1.1 million people by 2004.<sup>54</sup> However, some states like Alabama are also streamlining its restoration process, restoring the rights of several thousand people in the process.<sup>55</sup>

## **Federal Legislation**

In February 2002, the U.S. Senate briefly debated an amendment to a bill offered by Nevada Senator Harry Reid that sought to restore ex-felons the right to vote in federal elections.

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<sup>53</sup> <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/25/AR2010092501818.html>

<sup>54</sup> Manza, Jeff and Uggen Christopher, *Locked Out*, page 90

<sup>55</sup> *Id.*

The purpose of the amendment was to secure the Federal voting rights of certain qualified persons who have served their sentences...and to restore fairness in the Federal election process by ensuring that ex-offenders who have fully served their sentences neither are nor denied the right to vote.<sup>56</sup> The amendment declared,

The right of an individual who is a citizen of the United States to vote in any election for Federal office shall not be denied or abridged because that individual has been convicted of a criminal offense unless, at the time of the election, such individual-is serving a felony sentence in a correctional institution or facility; or is on parole or probation for felony offense.<sup>57</sup>

The amendment is based on the fact that “the right to vote is the most basic constitutive act of citizenship and regaining the right to vote reintegrates offenders into free society. The rights to vote may not be abridged or denied by the United States or by any State on account race, color, offender, or previous condition of servitude. Basic equal protection requires an equal opportunity for United States citizens to vote in Federal Statute.”<sup>58</sup> The amendment called for the law to be enforced by the Attorney General; he or she may bring a civil action in a court competent jurisdiction to obtain a declaratory or injunctive relief as is necessary to remedy a violation of

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<sup>56</sup> Congressional Record, 107<sup>th</sup> Cong., 2<sup>nd</sup> sess., vol. 148, U.S. Senate, S798

<sup>57</sup> Id. at S798

<sup>58</sup> Id.

this title.<sup>59</sup> The aggrieved person must give written notice of the violation to the chief election official of the State involved.<sup>60</sup>

Senator Reid believed that the fundamental premise of democracy is that every vote counts.<sup>61</sup> The proposed legislation will allow fairer elections.<sup>62</sup> Reid believed the legislation was necessary for several reasons. Reid first established that the legislation was important because prisoners should only be punished while they are imprisoned and on parole; after they serve their time, all voting rights should be restored. “[T]his amendment ensures that ex-felons, people who fully served their sentences, have completed their probation, have completed their parole, should not be denied their right to vote.”<sup>63</sup> The second reason the amendment should be passed is that felony disenfranchisement creates disparate impact on minorities, “this disproportionately affects ethnic minorities. According to the Sentencing Project, an estimated 13 percent of the African Americans throughout the United States are unable to vote as a result of varying States disenfranchisement laws. The rate is unbelievably seven times the average.”<sup>64</sup>

Reid also shed light on the fact that statistics of African American disenfranchisement are even higher in some states. “In Florida and Alabama more than 31 percent of all African American men are permanently barred from ever voting in those [Alabama and Florida] states again. In six other states, the percentage of African American men permanently disenfranchised is over 20

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<sup>59</sup> Id

<sup>60</sup> Id.

<sup>61</sup> Id. at S799

<sup>62</sup> Id

<sup>63</sup> Id

<sup>64</sup> Id

percent.<sup>65</sup> Although the statistics of African American male disenfranchisement is bleak, the future of is a nightmare. The Sentencing Project estimates that up to 40 percent of African American men may permanently lose their right to vote.<sup>66</sup>

Although Senator Reid provides substantial rationales for approving the amendment to abolish voter disenfranchisement laws, Kentucky Republican Mitch McConnell issued a critical response. He began his response by making the classic federalism argument, “this is an issue for the states, not the Federal Government. Voter qualification is generally a power the constitution leaves within the prerogative of the states.”<sup>67</sup> He then attempted to offer s substantive defense of felon disenfranchisement:

States have a significant interest in reserving the vote for those who have abided by the social contract that forms the foundation of a representative democracy. We are talking about rapists, murderers, robbers, and even terrorists and spies. Do we want to see convicted terrorist who seek to destroy this country voting in elections? Do we want to see jailhouse blocs” banding together to push sheriffs and government officials who are tough on crime?<sup>68</sup>

McConnell’s response lays out the extreme and least pleasant aspects of restoring voting right to ex-felons. McConnell’s reaction to the legislation may be in part due to his belief that felons truly have breached the social contract and should be punished, or it could be because the

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<sup>65</sup> Id

<sup>66</sup> Id.

<sup>67</sup> Id. at S802

<sup>68</sup> Id.

disenfranchisement of ex-felons has benefitted him the in the past. In, 1984 McConnell just managed to beat two-term incumbent senator Walter Huddleston by a narrow margin of 5,269 votes.<sup>69</sup> If disenfranchised voters who tend to be African American and members of Democratic Party were allowed to vote, McConnell may not have won the race.

## Legal Challenges to Felon Disenfranchisement Laws

After the Civil War, the Fourteenth Amendment forced states to choose between extending suffrage to all males or lose some congressional representation. Since states created the choice, Section Two of the Amendment made an exception for states that disenfranchised males “for participation in rebellion, or other crime.”<sup>70</sup> Due to this phrase courts have upheld the practice of excluding ex-felons from voting.<sup>71</sup>

In *Richardson v. Ramirez* the court reversed a contrary decision by the California Supreme Court, which had determined that the disenfranchisement of ex-felons beyond the expiration of the terms of their incarceration and parole violated the Equal Protection of the Fourteenth amendment.<sup>72</sup> The court held that state criminal disenfranchisement provisions do not per se deny equal protection of the laws.<sup>73</sup> The court carved out an exception to the practice in *Hunter v. Underwood*. In *Hunter*, an Alabama state constitutional provision, adopted in 1901 and

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<sup>69</sup> Manza, Jeff and Uggen Christopher, *Locked Out*, page 182

<sup>70</sup> XIII Amendment of the CONSTITUTION

<sup>71</sup> Manza, Jeff and Uggen Christopher, *Locked Out*, page 314

<sup>72</sup> *Richardson v. Ramirez*, 94 S.Ct. 2655 (1974)

<sup>73</sup> *Richardson*, 94 S.Ct. 2655 at 2669



denying the franchise to persons convicted of “any crime...involving moral turpitude” as well as other offenses, was enacted in order to disenfranchise Black citizens and where the provision continued to have the effect today.<sup>74</sup> The court held that the Alabama state constitutional provision violated the Equal Protection Clause of the Fourteenth Amendment.<sup>75</sup> The court pointed to the disparate impact of the provision, which included the fact that the provision had disenfranchised approximately 10 times as many Blacks as Whites, and the fact that Blacks were 1.7 times more likely than Whites to suffer disenfranchisement for the commission of non-prison offenses and the discriminatory intent of the provision.<sup>76</sup>

The legality of disenfranchisement has rested on the Ramirez decision and was never invalidated even at the time when restrictions on the right to vote were declared unconstitutional.<sup>77</sup> Felony disenfranchisement continues to be upheld.

# Washington and Lee University

## **Challenging Disenfranchisement under the Voting Rights Act**

Challenges to disenfranchisement laws based on the fifteenth amendment or Section Two of the Voting Rights Act and assert that disenfranchisement laws serve to dilute or to deny the right to vote on the basis of race. The Voting Rights Act requires courts to analyze all voting-related claims of racial discrimination using results-based test that considers “totality of the

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<sup>74</sup> Hunter v. Underwood, 105 S. Ct. 1916 (1985)

<sup>75</sup> Id

<sup>76</sup> Id.

<sup>77</sup> Uggem, Manza, Brehen pg 315. The Warren court invalidated restrictions on the right to vote in Kramer v. Union Free District (1969), Reynolds v. Sims (1964), South Carolina v. Katzenbach, Harper v. Virginia State Board of Elections(1966)

circumstances.” Although the amendment was passed, it has little impact on the disenfranchisement laws.

In *Farrakhan v. Washington*, the court emphasized that felony disenfranchisement provisions violating the Voting Rights Act is cognizable under section 2 of the Act.<sup>78</sup> Felon disenfranchisement is a voting qualification, and it is clear that any voting qualification that denies citizens the right to vote in a discriminatory manner violates the act.<sup>79</sup> The Supreme Court made clear that a state may not use felon disenfranchisement as a tool to discriminate on the basis of race.<sup>80</sup> *Richardson* makes clear that states may deprive felons of the right to vote without violating the 14<sup>th</sup> amendment. However, when felon disenfranchisement results in denial of the right to vote or voter dilution on account of race or color, Section Two of the Voting Rights Act affords disenfranchised felons the means to seek redress.

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## Proposal

As the Supreme Court of the United States has reiterated so many times, every citizen has the “right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right stroke at the heart of the representative government”<sup>81</sup> Felon disenfranchisement is a restriction on the rights of citizens to vote and presents a detriment to representative government. I do not propose that felons maintain their voting rights

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<sup>78</sup> *Farrakhan v. Washington*, cert. denied, 125 S. Ct. 477 (U.S. 2004)

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Reynolds v. Sims*, 377 U.S. 533 (1964)

throughout the time they are incarcerated or serving parole. However, I do propose that once a felon serves his or her jail and parole sentence, his or her voting rights should be restored. All other methods to restore voting rights is just a band aid on the real problem and may be a creation of problems in the future.

The effective and efficient restoration procedures in Virginia are praise worthy. But, if the governor is allowing voter restoration at such high rates, why is the voter restoration process even necessary? It seems to be a drain on state resources and still leaves people who do not have the education, information or access without their voting rights. The most problematic feature of voter restoration procedures is that they vary state by state; leaving residents in state B with an adequate means to obtain voter registration rights, while those in State A still cannot receive their rights until after they have a formal hearing.<sup>82</sup> While those in favor of such procedures may cry out “Federalism” and “States rights” these procedures and felony disenfranchisement as a whole have a profound impact on the entire country.

The political process has not been effective either. Congressman and Senators have yet to compromise on the disenfranchisement laws. Many believe they should be abolished altogether, while others believe that they continue to serve as a source of punishment to residents who have broken the law.

I propose that the judicial system do what it has proclaimed is its rightful duty which the court declared in the famous case *Marbury v. Madison*, “It is emphatically the province and duty of the judicial department to say what the law is.”<sup>83</sup> The Supreme Court should overrule

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<sup>82</sup> Uggen and Manza at 90

<sup>83</sup> *Marbur v. Madison*, 5 U.S. 137

Richardson v. Ramirez by first ruling that section two of the Fourth Amendment is not applicable to felons and second, by applying strict scrutiny to felony disenfranchisement statutes.

### Revisiting *Richardson v. Ramirez*

In *Richardson v. Ramirez*, the Justices did not decide the case according to conventional Equal Protection jurisprudence. The judgment rested on a section of the Fourteenth Amendment that many people skim over or rarely give much credence to. However, in *Richardson* the Court upheld felony disenfranchisements based on section two of the Fourteenth Amendment, which states:

Representatives shall be apportioned among the several States according to their

respective numbers, counting the whole number of persons in each state...But when the right to vote at any election for the choice of electors for President and Vice

President...is denied to any male inhabitants of such states, being twenty one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime.*<sup>84</sup>

The court determined that “or other crime” expressly allows states to exempt persons that were convicted of other crimes from voting and thus not violating the Fourteenth Amendment. The court first looked at the legislative history to determine the intent of the framers and concluded

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<sup>84</sup> Section two of the Equal Protection Clause of the CONSTITUTION

that “what legislative history there is indicates that this language was intended by Congress to mean what it says.”<sup>85</sup>

The language that the court relied on was sparse and the court admitted itself that the framers primary concern was not the two forms of disenfranchisement, but the effect of reduced representation upon the states.<sup>86</sup> The court then refers to the house and senate debates on the floor. While the debate in the house covered the subject exhaustively, with Representative Eckley of Ohio expressing his fears of pirates and counterfeiters or other criminals voting for the president.

But suppose the mass of the people of a State are pirates, counterfeiters or other criminals, would gentlemen be willing to repeal the laws now in force in order to give them an opportunity to land their piratical crafts and come on shore to assist in the election of a President or member of Congress because they are numerous?<sup>87</sup>

Representative Eckley seems to be concerned with the individuals who are committing crimes against the United States as a nation, not those who are committing crimes against individuals. Although the house debate was exhaustive, the debates in the Senate were not due to allegedly unreported caucuses conducted off the senate floor.<sup>88</sup> There is no clear definition of other “other crimes” and one was not found by the court in Richardson.

### **Applying Strict Scrutiny**

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<sup>86</sup> Richardson, 94 S.Ct. 2669

<sup>87</sup> Id at 2670

<sup>88</sup> Id

The disenfranchisement of ex-felons should be measured against the requirements of the Equal Protection Clause of section one of the Fourteenth Amendment. Since the voting is a fundamental right, strict scrutiny must be applied.<sup>89</sup> Applying strict scrutiny the state has the heavy burden to show that disenfranchisement is necessary to promote a legitimate and substantial state interest.<sup>90</sup> Second, the classification is narrowly tailored, and third there are no other reasonable ways in which to reach the states goal.<sup>91</sup>

Disenfranchisement laws do not meet the requirements of strict scrutiny. States disenfranchisement laws do not promote a legitimate and substantial state interest. Kentucky Senator Mitch McConnell proclaimed at a Senate hearing that, “states have a significant interest in reserving the vote for those who have abided by the social contract that forms the foundation of a representative democracy.”<sup>92</sup> The Lockean principle that Senator McConnell articulates is an legitimate interest of a state, but it is not a substantial state interest that has the ability to shut out a significant portion of people in a population especially since the people have paid their debts to society and the voting is a way method in which they can become re-integrated in society. In addition, the classification is not narrowly tailored. A person can be convicted of a felony by committing a host of crimes ranging from burglary to drug possession and to murder. Lastly, there are other reasonable methods the state can use in order to reach its goal to punish those which have committed a criminal offense. The most obvious method is to not allow felons to vote while in prison and on parole.

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<sup>89</sup> Reynolds v. Sims, 377 U.S. 533 at 555 (1964)

<sup>90</sup> Dunn v. Blumstein, 404 U.S. 330 at 343 (1972)

<sup>91</sup> Dunn, 404 U.S. 404 U.S. 330 at 343

<sup>92</sup> Congressional Record, 107th Cong., 2nd sess., vol. 148, U.S. Senate, S802

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